

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VIDEO GAMING TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
-VS-)	No. 17-CV-454-GKF-JFJ
)	
CASTLE HILL STUDIOS, INC., et al.,)	
)	
Defendant(s).)	

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE
SEPTEMBER 3, 2019

REPORTED BY: **BRIAN P. NEIL, RMR-CRR**
United States Court Reporter

A P P E A R A N C E S

Gary M. Rubman, Peter A. Swanson, and Rebecca B. Dalton, Attorneys at Law, Covington & Burling, 850 Tenth Street N.W., Washington, DC, 20001, attorneys on behalf of the Plaintiff;

G. Dean Luthey, Jr., Attorney at Law, Gable & Gotwals, 100 West 5th Street, Suite 1100, Tulsa, Oklahoma, 74103, attorney on behalf of the Plaintiff;

Robert C. Gill, Henry A. Platt, and Matthew J. Antonelli, Attorneys at Law, Saul, Ewing, Arnstein & Lehr, 1919 Pennsylvania Avenue N.W., Suite 550, Washington, DC, 20006, attorneys on behalf of the Defendants;

Jonathan S. Jacobs, Attorney at Law, Zobrist Law Group, 1900 Arlington Boulevard, Suite B, Charlottesville, Virginia, 22905, attorney on behalf of the Defendants;

James C. Hodges, Attorney at Law, 2622 East 21st Street, Suite 4, Tulsa, Oklahoma, 74114, attorney on behalf of the Defendants.

Thomas G. Connolly, Attorney at Law, Harris, Wiltshire & Grannis, 1919 M Street N.W., Suite 800, Washington, DC, 20036, attorney on behalf of the Defendants.

1 Tuesday, September 3, 2019

2 * * * * *

3 DEPUTY COURT CLERK: This is Case No. 17-CV-454-GKF,
4 Video Gaming Technologies, Inc. v. Castle Hill Studios, LLC.
5 Counsel, please state your appearances for the record.

6 MR. LUTHEY: Dean Luthey for the plaintiff.

7 MR. RUBMAN: Good afternoon. Gary Rubman from
8 Covington for the plaintiff. I'm joined by Peter Swanson and
9 Rebecca Dalton also from Covington.

10 THE COURT: Welcome.

11 MR. GILL: Good afternoon, Your Honor. Robert Gill
12 and Henry Platt and Matthew Antonelli from the Saul, Ewing,
13 Arnstein & Lehr law firm on behalf of defendants.

14 THE COURT: Good afternoon.

15 MR. HODGES: Afternoon, Your Honor. James Hodges
16 for the defendants. I'd like to also introduce a new counsel
17 for the defendants, Thomas Connolly.

18 MR. CONNOLLY: Your Honor, good afternoon. Thank
19 you.

20 THE COURT: Good afternoon. And, in addition, we
21 have one more on the phone, Karen?

22 DEPUTY COURT CLERK: Mr. Jacobs.

23 THE COURT: Mr. Jacobs, can you hear us?

24 MR. JACOBS: Yes. I can hear -- I can hear some
25 portion of what's going on. Nice to be here and be a voice,

1 Your Honor. Thanks for having me.

2 THE COURT: And where were you detained, Atlanta?

3 MR. JACOBS: I'm stuck in Atlanta. My flight to
4 Atlanta was delayed and so I couldn't make it to Tulsa on time.
5 Bad luck.

6 THE COURT: I see some knowing nods in the attorneys
7 in front of me who've also been stuck in Atlanta at times in
8 the past. I recommend Charlotte when you're coming to and from
9 Washington.

10 All right. We've got a number of issues here. This is
11 one of these rare cases where unfortunately we're at the final
12 pretrial conference and we don't know yet what's going to be
13 tried because the parties take disparate positions with regard
14 to the claims that remain even after what the court believed to
15 be clear rulings.

16 The first issue is one that was raised in the brief
17 filed by Castle Hill with regard to unusual objections to
18 deposition designations at docket No. 366. The court concurs
19 with Castle Hill's position contained in its briefing that VGT
20 is reading the court's ruling on page 9 of docket No. 344 --
21 that is the ruling on the motion for partial summary judgment
22 of Plaintiff VGT -- in that VGT is reading that ruling too
23 broadly. In that order, the court merely held that Castle Hill
24 had produced insufficient evidence as to its affirmative
25 defense of unclean hands with respect to VGT's asserted

1 trademarks and trade secrets. The court limited Castle Hill
2 Gaming's unclean hands defense to VGT's trade dress claims.

3 It appears that VGT is now reading that decision to
4 preclude fast-follow evidence from CHG to defend VGT's know-how
5 claim. For example, in an effort to defend against VGT's
6 know-how claim with respect to claim volatility, it appears to
7 the court that Castle Hill may attempt to show that an
8 observer, for instance, can determine volatility without resort
9 to alleged know-how trade secrets. So VGT's position goes too
10 far. And I thought that was important because it's showing up
11 in a lot of permutations, objections to deposition
12 designations, that sort of thing.

13 Now, you all have framed up a number of the issues
14 fairly well in the joint proposed pretrial order. The first
15 issue begins on page 2 of the joint proposed pretrial order.
16 With respect to the dispute regarding trade dress on pages 1
17 through 3 of the proposed pretrial order, VGT attempts to
18 insert "themes" as a seventh element of its trade dress claim
19 and 14 new game series which it proposes the court evaluate at
20 trial.

21 The court rules, based upon the briefing, that VGT
22 shall not be permitted to backdoor 14 additional game titles
23 into its trade dress claim. Specifically, the court cites the
24 following: First, VGT's current position is contrary to the
25 position that it took during the dispositive motion hearing.

1 In that hearing, counsel for VGT stated as follows, and I
2 quote: "But anyway, to make clear what is at issue here, this
3 is the trade dress that's at issue. There's six elements.
4 There's the game cabinet, the red strobe at the top, the reel
5 resolution sound that we heard, the award sound that we heard,
6 the bingo pays and plays and the red swing free spins. These
7 six elements in combination, no one in isolation, but all six
8 in combination are the trade dress at issue.

9 "The trademarks at issue, there are four series of
10 games in which we are -- on which we are basing our claims:
11 Crazy Billions, Mr. Money Bags, Polar High Roller, and
12 Greenback Jack. Within those trademarks, there are -- within
13 each series of those, there are four types of marks for which
14 we seek protection: The word marks, the logo marks, the
15 artwork on each panel, and then the characters."

16 Further, the PowerPoint presentation provided by VGT to
17 the court identifies only the foregoing six elements as being
18 VGT's trade dress at issue and the four VGT game series.

19 Further, as discussed in the court's order on Castle
20 Hill's motion for summary judgment, the Tenth Circuit
21 previously recognized that "an articulation requirement for a
22 protectable mark" and noted that other circuits have adopted a
23 requirement that a plaintiff "articulate the specific elements
24 which comprise its distinct dress."

25 And I'm citing *Forney Industries*, 835 F.3d 1238, at

1 page 1232, (10th Cir. 2016), quoting *Landscape Forms, Inc.* I
2 won't further burden the record with the citation there.

3 Further, when a plaintiff claims protection of trade
4 dress utilized across a line of products, courts have required
5 a plaintiff to "articulate the specific common elements sought
6 to be protected."

7 VGT now points to its "themes/marks" but failed to
8 identify any themes or marks in its summary judgment briefing
9 apart from the four-game series discussed in the order. The
10 general concept of themes is overbroad and cannot constitute a
11 specific common element, particularly in view of VGT's
12 representations to the court at the summary judgment hearing to
13 be protected as trade dress.

14 So that addresses the first issue.

15 Secondly, with regard to the issue at pages 4 through 6
16 of the proposed pretrial order with regard to trademark, VGT
17 contends that the VGT common law trademark claim includes,
18 No. 1, the character of Mr. Money Bags himself; and No. 2,
19 Mr. Money Bags and design mark as it appears in color.

20 It would appear to the court that VGT has never before
21 asserted these specific claims. This court granted summary
22 judgment on all common law trademark claims other than those
23 based on the marks Crazy Billions; Mr. Money Bags, the
24 modernized version; and Polar High Roller. So, I mean, it
25 would appear, unless there's something that the court is

1 completely missing, that we've ruled on this and this is
2 asserted now for the very first time in this lawsuit.

3 Mr. Rubman.

4 MR. SWANSON: Actually, I'll address that, Your
5 Honor.

6 THE COURT: Yes, sir.

7 MR. SWANSON: With respect to the common law
8 trademark claim for Mr. Money Bags, Your Honor, we believe we
9 have been consistent, that that claim includes the logo and
10 Mr. Money Bags' character in color. This was in our
11 interrogatory response that Your Honor has reviewed. We
12 included color photographs or color images of the artwork of
13 all the games at issue, including Mr. Money Bags. In the
14 identification of the extant claims, we further made clear that
15 it was the artwork for Mr. Money Bags.

16 A couple of other points. In our summary judgment
17 opposition, in describing the unregistered marks on page 12 --

18 THE COURT: Got it right in front of me.

19 MR. SWANSON: -- we included the original Mr. Money
20 Bags artwork or logo in color on page 12 and that was
21 underneath unregistered trademarks.

22 THE COURT: So does VGT agree apparently that the
23 registered mark in color does not fall within the registered
24 trademark claim?

25 MR. SWANSON: So the trademark registration is not

1 limited to color.

2 THE COURT: Now, that's not my question. That's not
3 my question.

4 MR. SWANSON: Uh-huh.

5 THE COURT: You appear to concede here that the
6 registered mark in color does not fall within the registered
7 trademark claim. Is that correct?

8 MR. SWANSON: That's -- yes. If I understand your
9 question, Your Honor, the --

10 THE COURT: Because you're trying to insert it here
11 in the common law trademark claim; correct?

12 MR. SWANSON: Correct. That would be the
13 distinction between --

14 THE COURT: So you're conceding here on the record
15 that the registered marked in color does not fall within the
16 registered trademark claim; correct?

17 MR. SWANSON: The Mr. Money Bags design mark that's
18 part of the registered trademark claim --

19 THE COURT: Yes.

20 MR. SWANSON: -- is not in color, correct. Yeah.

21 THE COURT: Okay. So point out to me where you have
22 alleged either that the character of Mr. Money Bags himself is
23 one of your common law trademarks claims and/or that Mr. Money
24 Bags, the design mark, as it appears in color is part of your
25 common law trademark claim.

1 MR. SWANSON: Sure, Your Honor. So in our -- again,
2 in our interrogatory response -- this is our response to
3 interrogatory No. 1 on the trademark claims --

4 THE COURT: Okay. Where's that in the pile of stuff
5 that's been prepared to me?

6 MR. SWANSON: Sure.

7 THE COURT: And I've got a room next door that is
8 covered on three lengthy tables with the materials that you've
9 provided to me so I can take a quick jaunt over there and find
10 it in the mountain of paper.

11 MR. SWANSON: Sure. Actually, why don't I grab --

12 *(Discussion held off the record)*

13 THE COURT: And that's 185-11 or something; is that
14 correct?

15 MR. SWANSON: The document for the interrogatory
16 response?

17 THE COURT: Yes.

18 MR. SWANSON: I actually don't have it in front of
19 me but that --

20 THE COURT: I think we're going to run and get it.

21 MR. SWANSON: Okay.

22 THE COURT: In speaking with my clerk, the concern
23 here was to the extent that the registered mark in color would
24 fall within the registered mark claim, our concern was that you
25 couldn't seek recovery for both. And now that you concede that

1 it's not part of the registered claim, the view is that the
2 order on summary judgment would allow you to include in your
3 common law claims the registered mark in color. So that would
4 leave us then only dealing with your position that the
5 character of Mr. Money Bags himself is part of your common law
6 trademark claim.

7 MR. SWANSON: Sure. And on that, Your Honor, I can
8 show you in the interrogatory response, once we have that,
9 where we referred to the character in the response. I would
10 also refer Your Honor to docket No. 143 which was VGT's
11 identification of extant trademark infringement claims. And --

12 *(Discussion held off the record)*

13 THE COURT: Okay. I've got 185-11 and it appears to
14 be easily -- well, it's 198 pages.

15 MR. SWANSON: Yes.

16 THE COURT: So you might want to refer me somewhere
17 within the 198 pages. Forgive me for not having instant
18 recall.

19 MR. SWANSON: Sure, Your Honor. So page -- the
20 bottom of page 8 --

21 THE COURT: The words as well as the visual images
22 incorporated into the games?

23 MR. SWANSON: Correct. Including the game's
24 artwork, characters, and logos. And we made a similar
25 statement in docket No. 143. Actually, to be more specific,

1 Your Honor, on page 22 of the interrogatory response, which was
2 the subpart of that interrogatory response in which we were
3 discussing Mr. Money Bags specifically, in the middle of that
4 paragraph in the middle of the page on 22, we say, "VGT relies
5 on at least the following marks used in connection with
6 Mr. Money Bags game title, the word mark, the artwork," and
7 then towards the end of that paragraph, "and the Mr. Money Bags
8 character as depicted on the Mr. Money Bags game and elsewhere.

9 THE COURT: I don't seem to be following -- are you
10 saying 22 of 199 or 22 with the page number on the bottom as
11 22?

12 MR. SWANSON: Page number on the bottom, Your Honor.

13 THE COURT: Okay. Refer me again to the sentence.

14 MR. SWANSON: So if we're looking at the same thing,
15 it's the paragraph that begins "for purposes of this
16 litigation."

17 THE COURT: Yes, sir.

18 MR. SWANSON: And it goes on to say, "VGT relies on
19 at least the following marks used in connection with the
20 Mr. Money Bags game title," and then we list several. If you
21 jump to the end of that paragraph, four lines up from the
22 bottom, "and the Mr. Money Bags character as depicted on the
23 Mr. Money Bags game and elsewhere."

24 *(Discussion held off the record)*

25 THE COURT: All right. Anything else?

1 **MR. SWANSON:** That in docket No. 143, again, refers
2 specifically to the Mr. Money Bags character.

3 **THE COURT:** All right. And let me take a look at it
4 here.

5 **MR. SWANSON:** And this would be starting at the
6 bottom of page 1 and then going on to page 2, "and the game's
7 characters; i.e., Crazy Bill, Dynamite Daisy, Mr. Money Bags."

8 **THE COURT:** All right. Frankly, you had used this
9 language that's contained on page 22 -- it's actually page 23
10 of 199 -- in your sixth supplemental objections and responses
11 to Defendant Castle Hill Studio, LLC's first set of
12 interrogatories, the 199-page document. That paragraph was
13 used as a common response with respect to many of these series,
14 and we read this as being one of the factors in combination
15 that you relied upon as evidenced by the colon followed by the
16 words "the Mr. Money Bags word mark," etcetera, etcetera
17 etcetera, etcetera.

18 **MR. SWANSON:** Uh-huh.

19 **THE COURT:** So let me get a response here from
20 Mr. Gill.

21 **MR. SWANSON:** And just to be clear on that, Your
22 Honor, I mean, I do think that we are suggesting the approach
23 the court took in the summary judgment ruling is the correct
24 approach, looking at the name, the artwork, the character, the
25 colors, looking at all those elements together.

1 THE COURT: All right. But now as I understand
2 it -- maybe I misunderstand -- but you're saying that the
3 common law trademark claim includes, as a stand-alone claim,
4 the character of Mr. Money Bags himself?

5 MR. SWANSON: I mean, the way we've defined it is
6 it's the artwork, including the character, and the name. It is
7 those elements looking at all those elements together.

8 THE COURT: Perhaps this is just a failure to
9 communicate. Let me get Mr. Gill's view here.

10 MR. SWANSON: Yes.

11 MR. GILL: Thank you, Your Honor. I'm a little
12 hesitant to raise this issue that I brought up when we were
13 here for our summary judgment argument, but it's an issue that
14 presents itself again and here we are 13 days before trial.

15 THE COURT: Right.

16 MR. GILL: And, first of all, let me start with the
17 very first issue your Honor addressed with Mr. Swanson, which
18 was the issue of the Mr. Money Bags mark and whether or not the
19 colorization was part of the claim, and I think he agreed that
20 it was not part of the claim but I have to say I agree. Having
21 seen the registration and the application for registration, I
22 think that is not part of the registered mark claim.

23 So the only way --

24 THE COURT: Color? Color is not?

25 MR. GILL: Exactly.

1 THE COURT: Right.

2 MR. GILL: The only way it could be part of a claim
3 would be part of the common law claim.

4 My problem with the common law claims in this case as
5 general matter is -- and you and I actually had this colloquy
6 at the summary judgment hearing -- with a claim based on a
7 registered mark, I have a very precise identification of what
8 the mark is at issue. I have a specimen of the mark that's
9 been accepted for registration by the Patent and Trademark
10 Office and that has been vetted by them.

11 But with a common law mark --

12 THE COURT: You chose this area of law to practice
13 in.

14 MR. GILL: I understand that. I understand that.

15 The problem with a common law mark is that we don't
16 have in this case a sufficiently specific description of the
17 mark. So we do have a generic description that was given by
18 the plaintiff that includes the artwork and the logos and the
19 characters. The problem is, the way the language was used it
20 looks as if to me what the claim was was the characters as part
21 of the overall artwork that's used in what's depicted on the
22 game, not the character individually. So I did not understand
23 and the statement of extant trademark claims that was filed by
24 the plaintiff with this court did nothing to inform me that
25 they were making a claim based on any kind of character on an

1 individual basis.

2 As a matter of fact, when Your Honor engaged Mr. Roman
3 on an issue at the summary judgment hearing and Your Honor
4 asked him about the issue or the doctrine of family of marks,
5 Mr. Roman said in response to Your Honor that I'm not familiar
6 with that, we're not claiming that here.

7 So to me, in order for them to make a claim for
8 infringement of a common law mark based on a character, then
9 that's something that would need to be specifically alleged so
10 we know what the nature of it is to the claim that they're
11 alleging. It remains to me a defect with the common law claims
12 in this case that the plaintiff has never specifically
13 identified the common law marks. They have generically.

14 So, for example, they would say, we claim the Mr. Money
15 Bags modernized version is a common law mark. But what they
16 don't do is accompanying that put in the very specific artwork
17 that they're claiming to get protection from. And what we do
18 know is that other variations of the Mr. Money Bags mark have
19 now been dismissed from this lawsuit in the course of summary
20 judgment.

21 So what seems clear to me on this record is that this
22 plaintiff may not claim trademark protection for common law
23 trademarks for the characters used in the Mr. Money Bags mark
24 and all those derivations of the Mr. Money Bags games that, for
25 example, have been dismissed from this lawsuit. The only

1 Mr. Money Bags mark that remains is the registered mark, which
2 is the design logo, and then the common law mark for the
3 modernized version. Those two marks are it.

4 THE COURT: Which would be colorized; correct?

5 MR. GILL: The modernized version?

6 THE COURT: Yes.

7 MR. GILL: Yes, Your Honor. Yes, yes.

8 THE COURT: And that's on page 35 of the court's
9 order.

10 MR. GILL: Right.

11 THE COURT: But to go the direction that VGT is now
12 urging the court to go now only 13 days before trial basically
13 I'd undermine the court's ruling, right or wrong, as to
14 Mr. Money Bags 2, Mr. Money Bags Deluxe, Mr. Money Bags Deluxe
15 (Beach Marks), Mr. Money Bags Lucky Streak, Mr. Money Bags
16 Bring in the Bucks, Mr. Money Bags Road to Riches, and
17 Mr. Money Bags Sparkling Wilds.

18 MR. GILL: I agree with that a hundred percent and
19 that is our position. Those are out of this case and I do not
20 feel like this plaintiff has sufficiently identified for us --
21 it's one thing for the plaintiff to say early in the litigation
22 that in a 200-page interrogatory response, we're claiming the
23 following, and the language which was always used in the
24 interrogatory answers is, the plaintiff claims the following,
25 including, but not limited to, and then there's a long

1 description.

2 But now we're at the very end of this funnel that is
3 the litigation process where things are supposed to be defined
4 over time. I didn't view the filing and identification of
5 extant trademark claims to include what they're claiming now,
6 and I think that's a problem for them and it's a problem for
7 me.

8 THE COURT: Well, I do as well. What I'm hearing
9 now, the last statement from the podium, was it seemed to me a
10 stepping away from the claim that the character of Mr. Money
11 Bags himself constituted a common law trademark claim.

12 Did you not hear it the same way?

13 MR. GILL: I'm having a hard time articulating this.
14 I'm trying to be as polite about this as I can. And I have
15 respect for Mr. Swanson. This isn't a personal dig.

16 THE COURT: Right.

17 MR. GILL: But I find that the language that the
18 plaintiff uses in connection with these claims to be imprecise
19 and very difficult for me to be able to identify what is at
20 issue. I will say confidently I do not understand them to have
21 clearly articulated that as a basis for the claim.

22 THE COURT: The summary judgment ruling will stand.
23 And to the extent that VGT is contending that the VGT common
24 law trademark claim includes the character of Mr. Money Bags
25 himself standing alone, that will not be permitted.

1 MR. GILL: And I understand that includes other
2 characters as well, Your Honor?

3 THE COURT: I'm sorry?

4 MR. GILL: Other characters are included in that
5 ruling as well I understand?

6 THE COURT: I'm just addressing what they raised.
7 I'm not going beyond that here. Go ahead.

8 MR. SWANSON: Oh, yes, Your Honor. I was actually
9 going to stand up and just try to clarify even further that we
10 will not claim based on a character standing alone --

11 THE COURT: All right. Thank you very much.

12 MR. SWANSON: Yes.

13 THE COURT: The next issue, VGT asserts that its
14 trade secret claims are not limited to three-reel mechanical
15 games.

16 I don't know that it's even necessary to invite comment
17 here. It seems absolutely clear to the court that in the
18 factual allegations of the amended complaint -- and I'm
19 referring to paragraphs 41 to 43 of the amended complaint --
20 VGT refers to its "three-reel mechanical games."

21 Moreover, in the court's order on summary judgment at
22 docket 373, pages 43 and 44, the court held, I thought clearly,
23 that Castle Hill would be prejudiced if VGT were permitted to
24 expand its claim to five-reel games at this late date.

25 So I'm scratching my head and I'm wondering if this is

1 how law is practiced in other jurisdictions. But unless
2 someone wants to clarify VGT's position, we'll move on to the
3 next item.

4 **MR. SWANSON:** Your Honor, that would be me
5 again.

6 So, Your Honor, we do recognize that the complaint does
7 say that the trade secrets relate to three-reel mechanical
8 games. However, from our earliest interrogatory response --

9 **THE COURT:** Look, I just read from your sixth
10 interrogatory response, item 185-11. This was the sixth
11 supplemental objections and responses. We're not operating
12 under the sixth supplemental interrogatory responses. We're
13 operating on the amended complaint and the court's order.

14 Anything else?

15 **MR. SWANSON:** Yes, Your Honor. I mean, to that very
16 point, the court's order was clear on the specific trade
17 secrets and confidential information at issue.

18 **THE COURT:** Yes, sir.

19 **MR. SWANSON:** And so as I understand the issue for
20 trial, it's whether those -- I think it's ten -- if you count
21 the trade secrets and know-how together, it's ten specific
22 items of information. So the issue for trial is, is that
23 information a trade secret or confidential and has it been
24 misappropriated?

25 It seems to me like Castle Hill is trying to engraft

1 this additional requirement where we also have to prove that
2 the information relates to our three-reel mechanical games.

3 THE COURT: Oh, I see. Well, I mean, I suppose -- I
4 mean, we're now getting into the theoretical. I mean, to the
5 extent that these trade secrets might spill over, that's just
6 the case; right? I mean, you've limited your trade secret
7 claims to three-reel mechanical games, and it may very well be
8 then that these trade secrets are used with respect to other
9 games but that's not my focus here.

10 MR. SWANSON: Right, yes. And we just don't think
11 it's necessary that we, you know, prove this additional element
12 of our claims that they seem to be -- that we show that each of
13 those ten items also relates to our three-reel mechanical
14 games --

15 THE COURT: Well, isn't that --

16 MR. SWANSON: -- as opposed to our games generally.

17 THE COURT: Isn't that part and parcel of your
18 burden, though?

19 MR. SWANSON: I think it's our burden to show that
20 each one is a trade secret or is confidential and has been
21 misappropriated by the defendants. I don't --

22 THE COURT: Well, don't you also have to show that
23 it's being used in connection with the three-reel mechanical
24 games? I mean, it should be fairly simple to do, shouldn't it?

25 MR. SWANSON: That it's being used, yes, in

1 connection with our games? I mean, yes, I do believe we can
2 show that with respect to most, if not all, of them.

3 THE COURT: So does this have to do with the
4 features that are not integrated into the Oklahoma Class II
5 games?

6 MR. SWANSON: No, Your Honor. I think this is a
7 separate issue.

8 THE COURT: Okay. So I'm trying to understand
9 because you're hedging in your language.

10 MR. SWANSON: Yeah. It just -- I mean, this came in
11 at the eleventh hour in negotiating the pretrial order. I
12 mean, given that we now have from Your Honor a very clear
13 identification of the trade secrets and confidential
14 information for trial, we view our burden at trial as just
15 proving up that those are trade secrets or confidential
16 information and that they've been misappropriated in connection
17 with the defendants' games.

18 You know, I don't know that we have to show -- make
19 some additional showing that we have used each trade secret in
20 connection with our three-reel mechanical games specifically as
21 opposed to Class II games more generally.

22 THE COURT: Can you give me an example of where that
23 might be a problem?

24 MR. SWANSON: Yeah. For instance, Your Honor, one
25 of the items of know-how -- well, you know, one that we've

1 talked about a lot is the bingo card algorithm, which is
2 certainly not specific to VGT's three-reel mechanical games.
3 Another one in the items of know-how would be the QR code
4 project, which again may not be specific to three-reel
5 mechanical games.

6 THE COURT: I'm not suggesting that you might --
7 that you would have to prove that it's specific to three-reel
8 mechanical games. But are you saying that you might have
9 difficulty showing that those trade secrets apply at all to any
10 three-reel mechanical games?

11 MR. SWANSON: I think on -- I think on a couple of
12 them, it's not clear that they would be related to three-reel
13 mechanical games.

14 THE COURT: All right. Let me get them in front of
15 me here.

16 Okay. Including QR code project? Or that's know-how.
17 So what are we talking about?

18 MR. SWANSON: Yes, Your Honor. Yeah, for instance,
19 in the know-how, like the use of the lease agreement would be
20 an example of one that --

21 THE COURT: I see. Well, but the use of the VGT
22 lease agreement is -- and, frankly, I think you've got an
23 uphill climb there -- but that's going to apply, at least at
24 this point, theoretically to three-reel mechanical games and
25 others; correct?

1 **MR. SWANSON:** Yeah. Presumably it would, yes. Yes,
2 Your Honor. So I think I understand what Your Honor is saying
3 is as long as each one relates at least in part to three-reel
4 mechanical games --

5 **THE COURT:** Well, that would be my impression as I
6 sit here. I mean, that's my surface impression.

7 Mr. Gill, your thoughts here?

8 **MR. GILL:** I'll have Mr. Antonelli address that,
9 Your Honor.

10 **THE COURT:** Very well.

11 **MR. ANTONELLI:** Good afternoon again, Your Honor.

12 **THE COURT:** Good afternoon.

13 **MR. ANTONELLI:** I think -- I think I'm struggling a
14 little bit to, again, understand exactly what VGT's position
15 is. We think what they -- they crafted the language of the
16 amended complaint, they wrote it, we didn't write it, and they
17 said that the trade secrets were, quote, relating to the
18 development and operation of the VGT three-reel mechanical
19 games. So I'm not sure why they wouldn't need to demonstrate
20 that the alleged trade secrets are -- is information related to
21 their games.

22 I think one of the reasons that you're hearing counsel
23 for VGT struggle with that is because, without getting too deep
24 into the merits of some of these know-how claims, they know
25 full that some of these things were just ideas that they never

1 used and that the evidence will show are things that perhaps
2 were discussed at some point at Castle Hill and quickly
3 dismissed.

4 THE COURT: Right. Like the QR codes --

5 MR. ANTONELLI: Like the QR codes are a perfect
6 example.

7 THE COURT: Right.

8 MR. ANTONELLI: Somebody at Castle Hill said, oh, we
9 think that's a bad idea. Somebody told me at VGT that one of
10 the lawyers said there were patents on that. That's the sum
11 and substance of the QR code.

12 So I'm not sure why we're going to trial on that issue
13 in the first place from VGT's perspective, but I think that's
14 what they're struggling with on the -- you know, applying it to
15 the three-reel mechanical games.

16 And, again, Your Honor, I think the -- they pled the
17 complaint the way they pled the complaint and they specified
18 that it were trade secrets relating to their development and
19 operation of the VGT three-reel mechanical games. That's the
20 way they articulated their claim, that's the claim that we're
21 going to trial on, and we think that's the burden that they
22 need to meet.

23 THE COURT: Okay. Well, it seems to me that that's
24 not something that has to be decided here definitively. It
25 would appear, though, that it was pled as a three-reel

1 mechanical game matter and arguably, as we sit here right now,
2 with respect to know-how, at least some of these could apply
3 not only to three-reel mechanical games, but maybe five-reel
4 mechanical games or five-reel video games or three-reel video
5 games. But it seems to me that as long as it applies to --
6 that know-how applies to a three-reel mechanical game, then
7 we'd need to be prepared to address it at trial; right?

8 MR. ANTONELLI: Yes, Your Honor.

9 THE COURT: Okay. Great. Thank you very much.

10 The next issue is as to whether the VUTSA claim is
11 limited to the bingo card algorithm and uniqueness testing
12 algorithm in nondeployed machines. That's one that will keep
13 you on the edge of your seat, huh?

14 Just to give you the benefit of our thinking here, it
15 appears that VGT's position is consistent with its position on
16 summary judgment and with the PowerPoint provided by VGT during
17 the dispositive motion hearing. I mean, it appears to us that
18 the VUTSA claim is not limited to the bingo card algorithm and
19 uniqueness testing algorithm in nondeployed machines.

20 So maybe I need to turn then to Castle Hill.

21 MR. ANTONELLI: Yes. Thank you, Your Honor. I
22 think what we struggled with when we were drafting the pretrial
23 language on this particular issue was that VGT amended its
24 complaint to add the Defend Trade Secrets Act claim and the
25 Virginia Uniform Trade Secrets Act claim.

1 Specifically with respect to the -- what we refer to as
2 the BMM code -- I know Your Honor is familiar with us using
3 that nomenclature -- that has to do with a version of a bingo
4 card generation algorithm that was submitted to BMM and was
5 never deployed in the field. So the reason that VGT stated --
6 when it amended its complaint, its stated reason for amending
7 was that they didn't think that because that algorithm was
8 never used in Oklahoma, or elsewhere, in commerce, they said
9 that we don't think it's encompassed by our Oklahoma Uniform
10 Trade Secrets Act claim. Therefore, they sought leave of
11 court, which was granted, and they amended to add the Virginia
12 Trade Secrets claim and the Defend Trade Secrets Act claim.

13 Our understanding all along has been that those claims
14 related to the BMM code, which was the nondeployed bingo card
15 generation algorithm, and an algorithm regarding uniqueness
16 testing that was experimental code that was submitted to BMM
17 and never deployed in the field and that those claims only
18 related to those two issues.

19 And then for the first time in the -- when we were
20 going back and forth on the pretrial, we heard oh, no, no, no,
21 no, the Virginia Uniform Trade Secrets Act applies to all of
22 our know-how claims and it applies to the bingo card generation
23 algorithm that you have in the field but the Oklahoma Uniform
24 Trade Secrets Act also applies to that.

25 We're just struggling to try to understand exactly what

-- which claim fits under -- which specific set of allegations fits under which legal theory of recovery.

THE COURT: I'll confess that I'm struggling as well. Because I have plaintiff's motion for leave to file amended complaint here, docket No. 73, page 7 of 13, subsection (e), on page 7, and VGT says, "VGT's claim for trade secret misappropriation under Oklahoma law may not encompass defendants' misappropriation of VGT's bingo card generation algorithm because defendants claim that they have not yet deployed the misappropriated algorithm in Oklahoma."

But it was our understanding that -- and correct me if I'm wrong -- that we have another algorithm that includes the uniqueness testing algorithm. I thought these two things were separate and apart, bingo card generation algorithm, uniqueness testing. And as I understand it, our position had to do with that lack of clarity.

So can you clarify this a bit?

MR. ANTONELLI: I can try.

THE COURT: Yeah.

MR. ANTONELLI: So there are -- from Castle Hill's perspective, there are two bingo card generation algorithms. So on the one hand, there's what we'll refer to -- you'll hear us talk a lot at trial about the GUID-based approach. So the GUID algorithm, we distinguish that from the BMM code on the other hand. The uniqueness testing is actually -- it's -- it

1 is a separate algorithm but it needs to be considered kind of
2 in the same breath with the bingo card generation. Because the
3 end goal of what a Class II manufacturer is doing is they're
4 trying to generate a bingo card and then demonstrate that that
5 bingo card is unique from all other bingo cards. So --

6 THE COURT: Got it. All right. So I haven't
7 completely wrapped my arms around that so you all need to make
8 that clear to me. Because I had understood these were two
9 separate but I can understand why those two functions have to
10 be performed at the same time. Right?

11 MR. ANTONELLI: So the last time when we were here
12 for the dispositive motions hearing, we talked a lot about the
13 Mersenne Twister and ceding it with a 32-bit integer. That is
14 all BMM code and that's the -- what we talk about being never
15 deployed in the field, the experimental code. That's what we
16 consider to fall under the Virginia Trade Secrets Act and
17 Defend Trade Secrets Act claims because it was never deployed
18 in the field.

19 So VGT says we do bingo card generation one single way,
20 and you, Castle Hill, have misappropriated that trade secret
21 through the BMM code and also through a completely separate and
22 different way that you do bingo card generation with your
23 deployed games. The way they generate the bingo card is
24 different, the way they do uniqueness testing is different for
25 the deployed games, the stuff in the field, what we would

1 consider as falling under -- if it's in the case at all, coming
2 only under Oklahoma Uniform Trade Secrets Act. That's a
3 different algorithm and different approach from the BMM code,
4 which is the Mersenne Twister-based algorithm. And VGT alleges
5 that the two very different ways that Castle Hill has
6 approached bingo card generation -- one deployed, one never
7 deployed -- that both of those ways are a violation of its
8 trade secret.

9 So, again, to kind of end where we started, the purpose
10 of their amendment was to allege that the BMM code, never
11 deployed, they say we learned about this in the course of
12 discovery, we need to amend our complaint, because we don't
13 think it falls under our existing claims. I don't read their
14 amended complaint as saying, oh, by the way, all these know-how
15 issues, those actually arise under the Virginia Uniform Trade
16 Secrets Act. That's not what they've alleged.

17 THE COURT: Well, it's very general.

18 MR. ANTONELLI: I agree. And it's, again, one of
19 the reasons that we asked the court -- and I thought the court
20 did do this -- in terms of narrowing and defining what trade
21 secrets and know-how claims the plaintiff is going to be
22 permitted to present at trial --

23 THE COURT: And I do that and you're not happy.

24 MR. ANTONELLI: Well, I was happy, Your Honor, until
25 we got to the pretrial order drafting, and then I learned that

1 the know-how allegedly arises under the Virginia Uniform Trade
2 Secrets Act as well.

3 THE COURT: All right.

4 MR. ANTONELLI: So I -- or, you know, other --
5 that's the first I heard that. So --

6 THE COURT: Okay.

7 MR. ANTONELLI: -- that's the struggle we're having.

8 THE COURT: Well, we need to resolve this here
9 today, folks. We need to know what we're going to go to trial
10 on in 13 days.

11 So VGT?

12 MR. SWANSON: Yes, Your Honor. I think there's two
13 issues. One is the scope of the VUTSA claim, one is the scope
14 of the OUTSA claim.

15 I appreciate that counsel never heard about our
16 position that the VUTSA claim includes the know-how and all
17 development work in Virginia. But we were very clear about
18 this in our summary judgment opposition on page 42 in footnote
19 14, in which we said that because CHG's development work was
20 coordinated from its headquarters in Virginia, the VUTSA claim
21 encompasses both categories of misappropriation, both
22 categories being the original development work that led to the
23 deployed games and the subsequent BMM work. So they may not
24 have read it but we said it, and I think Your Honor's summary
25 judgment ruling recognized that and notes on pages 58 and 59

1 that the VUTSA claim covers both the bingo algorithm, the
2 uniqueness testing algorithm, and the know-how. So that's
3 point one.

4 THE COURT: All right. Give me just one second to
5 take a look at this footnote in our order. Just one second.

6 MR. SWANSON: Really, it starts on page 41. We say
7 that VGT's claims under the OUTSA, the VUTSA, and Oklahoma
8 common law addressed Castle Hill's misappropriation of VGT's
9 trade secrets and confidential business information in
10 developing its Class II system in games that Castle Hill has
11 placed in the field. And then at the end of that paragraph, we
12 dropped a footnote explaining why the VUTSA covers that as well
13 as the BMM software.

14 THE COURT: All right. Now, what about the argument
15 about deployed and nondeployed games?

16 MR. SWANSON: With respect to the OUTSA claim, Your
17 Honor, or the --

18 THE COURT: Well, right now I'm focused on Virginia.

19 MR. SWANSON: Oh, Virginia?

20 THE COURT: Yeah.

21 MR. SWANSON: Yes. So, again, I think we were clear
22 in our summary judgment opposition on this so they have heard
23 about it before the pretrial order as point one.

24 Point two, the amended complaint clearly is not limited
25 to the additional BMM development work. Specifically,

1 paragraph 152 of the amended complaint, Castle Hill has used
2 one or more of the VGT trade secrets when developing games for
3 Castle Hill, including the CHG-infringing games in Virginia.
4 CHG has disclosed one or more of the VGT trade secrets in or
5 from Virginia to third parties, including testing labs. So we
6 didn't limit it just to the BMM claims.

7 And, Your Honor, I would just add, I mean, they're
8 trying to hold us to every allegation in the amended complaints
9 with respect to the definition of trade secrets and trademarks
10 and trade dress. Well, it should work both ways.

11 THE COURT: No. It does seem to the court that VGT
12 is correct here and it appears that these additional trade
13 secrets may be pursued under VUTSA.

14 Now, what about -- I've got a reference to trade
15 secrets 1 and 2 and 3 through 5. Are you taking the position
16 that the other trade secrets do not apply under VUTSA?

17 MR. SWANSON: No. I think what we said is that all
18 five apply to the VUTSA. I think the dispute on that one is
19 the OUTSA. The question was whether trade secret No. 2, which
20 is the uniqueness testing, whether that is part of the OUTSA.

21 THE COURT: Okay. I'm confused. I'm sorry.

22 So it would appear to the court that the plaintiff may
23 proceed on the VUTSA claim and all five trade secrets there.
24 Just one second.

25 *(Discussion held off the record)*

1 **THE COURT:** All right. The next issue is similarly
2 confusing and perhaps more so. I'm looking at page 8 of the
3 proposed pretrial order, middle of the page, and VGT makes the
4 statement at the beginning of the second full paragraph here:
5 "Contrary to CHG's position, nothing in the complaint or
6 amended complaint excludes trade secret 2," which is uniqueness
7 testing," from the OUTSA claim." And we understand that to be
8 a reference to the BMM code which was not deployed in Oklahoma.

9 So, first of all, is that -- are we understanding that
10 correctly?

11 **MR. SWANSON:** That does relate to the code submitted
12 to BMM, that's correct, Your Honor.

13 **THE COURT:** All right. So how does that -- how does
14 OUTSA apply if it wasn't deployed here in Oklahoma?

15 **MR. SWANSON:** So I think the issue from our
16 perspective is, you know, that fact has not been proven yet and
17 at -- you know, they didn't seek summary judgment to limit the
18 scope of the OUTSA claim to exclude that trade secret.

19 What we have from discovery is that they submitted --
20 they used that trade secret in connection with software that
21 they had submitted to BMM, and at the time discovery closed
22 they were still seeking approval of a bingo card method that we
23 claim incorporates the uniqueness testing algorithm. We have
24 not received updated discovery on that. We don't know whether
25 they've gotten approval of that, whether they've deployed it,

1 whether -- you know, what the status of that.

2 So if they want to -- if they want to prove at trial
3 that they've not -- they've not done anything with the BMM code
4 in Oklahoma, then that probably falls out at that point but
5 let's see what the facts are at trial, I guess.

6 THE COURT: Don't you have the burden of proof?

7 MR. SWANSON: We do and we would ask their witnesses
8 on that. But we think it's -- we think it is a fair issue for
9 trial given that they --

10 THE COURT: So you'd agree that they don't have to
11 prove it? It's your --

12 MR. SWANSON: Sure, sure. It's our burden to show
13 that, yeah, that code was used in Oklahoma, but I think we
14 should be able to ask their witnesses about that. And if we
15 have no proof, then we fail on that at trial. But if they had
16 wanted to exclude that from trial, they could have sought
17 summary judgment that we had no evidence and they haven't done
18 that.

19 THE COURT: All right. And so it doesn't apply to
20 this GUID code, it's clearly BMM code?

21 MR. SWANSON: With respect to the uniqueness
22 testing, that's correct, Your Honor.

23 THE COURT: Okay.

24 MR. SWANSON: Sorry. Just to be clear because I
25 don't want --

1 THE COURT: Mr. Luthey, are you clear on this?

2 MR. LUTHEY: Very, Your Honor.

3 MR. SWANSON: There are several permutations. We
4 will make this very clear at trial as to the timeline and the
5 permutations of the bingo card algorithm.

6 What I mentioned there, that at the close of discovery
7 they were trying to get approval of this new method, it does
8 include the GUID method but it also incorporated an aspect of
9 uniqueness testing. They kind of fused the two together.

10 THE COURT: See, that's where I'm unclear here.

11 MR. SWANSON: Yeah.

12 THE COURT: Can you maybe try to explain that to me
13 and how it falls out here in terms of the various claims --

14 MR. SWANSON: Sure.

15 THE COURT: -- this merging together of these codes
16 or algorithms?

17 MR. SWANSON: So we have Castle Hill's original
18 algorithm which is the GUID.

19 THE COURT: Right.

20 MR. SWANSON: That's the one that we know was
21 deployed or has been deployed in Oklahoma. We do claim that
22 that misappropriates the VGT bingo card algorithm.

23 Then once they received -- they tried to submit that
24 code to BMM. BMM said that that algorithm doesn't work based
25 on the way their system had it configured. That's when they

1 switched to what you've heard them call the Mersenne Twister
2 approach and they tried to submit that to BMM. We claim that
3 that also misappropriates the VGT bingo card algorithm and
4 that's what they've said they've not deployed in Oklahoma.

5 But then once they withdrew that code from BMM, they
6 then went on to a third algorithm in which they went back to
7 the GUID approach, but then they incorporated an aspect of the
8 uniqueness testing algorithm. We call it the "on-the-fly
9 uniqueness check."

10 THE COURT: You call it what?

11 MR. SWANSON: "On-the-fly uniqueness check." It
12 does a check for uniqueness kind of in real time as we
13 understand it.

14 And so that -- and that's where things stood at the end
15 of discovery. We don't know if that, again, has been approved,
16 if it's been deployed in Oklahoma. We have not received
17 updated discovery on that.

18 THE COURT: What do they call this approach?

19 MR. SWANSON: The third approach? I don't know if
20 -- if I've heard them refer to it by any specific name.

21 THE COURT: All right. Thank you very much.
22 Whack-A-Mole.

23 MR. ANTONELLI: I mean, Your Honor, we're again 13
24 days out from trial and I don't have the ability to put on a
25 clean sheet of paper, you know, what their -- what their claim

1 is and what trade secrets specifically relate to it. Because
2 it is confusing, and I understand why it's difficult for the
3 court to grasp, when we're talking about bingo card generation
4 and uniqueness testing and BMM and all these phrases that we
5 throw around but we're talking about very different approaches.
6 The three -- I mean, what counsel just said is that Castle Hill
7 approached bingo card generation three completely different
8 ways --

9 THE COURT: Right.

10 MR. ANTONELLI: -- at different points in time,
11 three different ways. But each --

12 THE COURT: And necessarily so because apparently it
13 didn't pass muster the very first two times. Is that correct?

14 MR. ANTONELLI: The code that was originally
15 deployed in the field passed muster with one regulatory -- or
16 one --

17 THE COURT: I stand corrected.

18 MR. ANTONELLI: -- testing lab.

19 THE COURT: You're right.

20 MR. ANTONELLI: There was a second testing lab that
21 they subsequently submitted that algorithm to. They raised
22 some issues. That was when the BMM -- what I call the "BMM
23 code" was submitted. That code was ultimately withdrawn.

24 The way the BMM code did bingo card generation and
25 uniqueness testing was different from the way they did it in

1 the deployed code and different from the bingo card generation
2 approach and uniqueness testing approach that was then
3 submitted to BMM. So they're all different but I guess VGT is
4 going to prove at trial that they all violate their same trade
5 secret.

6 Again, it's confusing to me as to is the uniqueness
7 testing just Virginia Uniform Trade Secrets or is it Oklahoma?
8 Counsel saying the fact hasn't been proven. They say they
9 don't have any evidence of it. So that was something I was
10 struggling with understanding how to respond to that. But, I
11 mean, I guess we'll see what the testimony at trial is.

12 THE COURT: I think at this point we have to, given
13 that it wasn't resolved at summary judgment, just on a
14 procedural basis.

15 MR. ANTONELLI: Understood, Your Honor.

16 THE COURT: Okay.

17 MR. ANTONELLI: One final issue that I want to raise
18 as we're talking about the trade secrets is the Defend Trade
19 Secrets Act claim and understanding exactly what that applies
20 to.

21 Again, we understood that the Defend Trade Secrets Act,
22 which was enacted after -- plaintiff amended their complaint
23 because the Defend Trade Secrets Act wasn't enacted when our
24 games that they say misappropriate their trade secrets were
25 actually originally deployed in the fold, that that claim --

1 and it doesn't have a retroactive effect -- that that claim is
2 only related to the BMM nondeployed algorithm and unique
3 testing associated with the nondeployed BMM code algorithm.
4 Again, that's what we have understood the claim to be, and I
5 just want to see if we can get a little clarity on that last
6 point.

7 THE COURT: All right. That's not an issue that I
8 had identified.

9 MR. SWANSON: We don't think that's an issue either.

10 THE COURT: Okay.

11 MR. SWANSON: We agree with that. I thought it was
12 clear in the pretrial order.

13 THE COURT: Very good. I do have a question here.
14 Does OUTSA apply to the bingo card generation algorithm claim
15 for games deployed in Oklahoma?

16 MR. SWANSON: Yes, Your Honor.

17 THE COURT: All right. And what is the defense
18 position? What is the defense position?

19 MR. ANTONELLI: I think we need to be very exact on
20 which algorithm we're talking about.

21 THE COURT: Right.

22 MR. ANTONELLI: So I don't -- I don't know -- I
23 apologize for not answering the court's question directly, but
24 I'm not sure -- when counsel says, yes, it applies to bingo
25 card generation, counsel also just described that Castle Hill

1 has done this three different ways. So which one?

2 THE COURT: Well, your response is basically where
3 we were left. We're not clear as to which algorithm we're
4 talking about. So let's see if we can nail this down.

5 MR. SWANSON: Sure. With respect to the OUTSA
6 claim, what we're talking about is the original bingo card
7 algorithm primarily. And then, as we've just been talking
8 about, again if the evidence in trial shows that any of these
9 -- the second or third algorithm has actually been approved and
10 deployed in Oklahoma, then presumably that would be a violation
11 of --

12 THE COURT: Well, but he's admitting here that the
13 second one was withdrawn; correct?

14 MR. SWANSON: Yes. That's what they've said, yeah.

15 THE COURT: So --

16 MR. SWANSON: So it may just be an issue with
17 respect to the third one.

18 THE COURT: Is that --

19 MR. ANTONELLI: I don't -- I don't understand there
20 to be an allegation in the amended complaint about a third
21 algorithm. So we had the deployed code -- the originally
22 deployed code and we had the BMM code. Those were the two
23 algorithms that were at issue. So now we're talking about -- I
24 agree that Castle Hill has approached this a third way but that
25 is -- I'm not sure where that is in the amended complaint.

1 THE COURT: All right. Let me quickly try to find
2 this in the amended complaint.

3 MR. SWANSON: Okay. I don't think the amended
4 complaint is specific to certain algorithms. We did put -- in
5 our summary judgment papers, again, and in the expert
6 declaration submitted in opposition to their summary judgment
7 motion, we did talk about the third algorithm.

8 THE COURT: Well, I'm looking at your presentation
9 from the hearing on the motion for summary judgment and you say
10 -- this is the Oklahoma Uniform Trade Secrets Act -- and you
11 say "bingo card algorithm."

12 MR. SWANSON: Correct.

13 THE COURT: Now, you say you're talking about the
14 original bingo card algorithm? Have we used an acronym for
15 that?

16 MR. SWANSON: The GUID approach is --

17 THE COURT: Okay. So I've got, as you could say,
18 GUID right there. So you're seeking as to GUID, which is the
19 original, and now you're seeking with regard to this alleged
20 third approach?

21 MR. SWANSON: Yes.

22 THE COURT: But you don't have any evidence of that?

23 MR. SWANSON: Again, at the end of discovery the way
24 things stood -- this was about a year ago -- they were trying
25 to get approval of this third approach. We haven't gotten

1 updated information from them on whether they have gotten
2 approval, whether it's been deployed in Oklahoma, if they have.

3 THE COURT: Well, but you don't have any evidence
4 that it --

5 MR. SWANSON: And they didn't seek summary judgment
6 on --

7 THE COURT: -- that it infringes your trade secret.

8 MR. SWANSON: No. We do, Your Honor. In opposition
9 to their summary judgment motion in Mr. Friedman's declaration,
10 he says in paragraph 32, "I understand that after CHG withdrew
11 its bingo algorithm that relied on the exhaustive uniqueness
12 check" -- that's the second one -- "CHG developed a new
13 algorithm that developed a 'on the fly' or real time uniqueness
14 check."

15 THE COURT: All right.

16 MR. SWANSON: Skipping ahead to the next paragraph,
17 "Castle Hill's on-the-fly method uses the same bingo card
18 compression scheme as the prior exhaustive uniqueness testing
19 approach by compressing each cell to just four bits, and like
20 VGT's uniqueness testing algorithm, the compressed values
21 enable the entire bingo card" -- and it goes on with the
22 details.

23 THE COURT: Okay. You're refreshing my
24 recollection. That's exactly what he says there.

25 MR. SWANSON: Yeah. So --

1 THE COURT: So for purposes of the pursuit of
2 justice here, to prevent the need for another lawsuit relative
3 to the additional algorithm here, and to try to get it wrapped
4 up, to the extent that we can, in one lawsuit, we'll allow it
5 to proceed with regard to that, and particularly in view of --
6 is it Dr. Friedman? I've forgotten.

7 MR. SWANSON: Mr. Friedman.

8 THE COURT: -- Mr. Friedman's statement contained in
9 the response to the motion for summary judgment.

10 MR. SWANSON: Thank you, Your Honor.

11 THE COURT: Or was it in the response or is it -- it
12 was the response.

13 MR. SWANSON: Response, yeah.

14 THE COURT: Right. All right. Next, I need to know
15 how many days does plaintiff anticipate needing for its portion
16 of the trial which would obviously include cross-examination by
17 defendant?

18 MR. RUBMAN: Your Honor, consistent with -- sorry --
19 Your Honor, our view continues to be that we expect to wrap up
20 our case in five days, assuming reasonable crosses and no real
21 surprises, but we've been on track for five days.

22 THE COURT: All right. Now, as I hope you can
23 appreciate, having waded through a lot of these depositions and
24 having had a few nonjury trials before, I know attorneys,
25 particularly for purposes of possible appeal, I like to dump just

1 as much onto a trial court as possible and ask to admit these
2 various depositions for consideration. It's not very
3 realistic, particularly given the condition of some of these
4 depositions. I mean, there have been a lot of designations of
5 irrelevant material. Just going through these, I see broad
6 swaths of these depositions that don't contain objections to
7 portions that have been designated, and I scratch my head as to
8 how these could possibly be -- this testimony could possibly be
9 relevant.

10 Not having the technical expertise, as some of you do,
11 I've been, I think, a little generous in terms of relevance
12 objections. Because if I think some of this testimony may well
13 be relevant, I've allowed it, but I think it's important for
14 you all to whittle this down as succinctly as you possibly can.

15 So to the extent that you wish to submit deposition
16 testimony at trial, it needs to be presented during the course
17 of the trial or whittled down to the extent that I can read it,
18 you know, after the end of the day so I can try to absorb this
19 information. Because this certainly is not the type of
20 information or the area in which I've been trained. I'm doing
21 the best I can. But, you know, I'm hearing some concepts here
22 today that I've not heard even before in this lawsuit.

23 MR. RUBMAN: Right. Understood.

24 THE COURT: So fortunately not very many.

25 MR. RUBMAN: Yeah.

1 THE COURT: But I think it's important that you all
2 distill and edit, and the depositions that have been submitted
3 for ruling on objections have very clearly not been distilled
4 very well.

5 So what other issues do I need to address here?

6 MR. RUBMAN: Well, on that point, Your Honor, I do
7 appreciate you raising it. And speaking for VGT, we are in the
8 process of narrowing ours down. We did a runtime, if you take
9 all those original depositions, how much time it would take.
10 And, you know, Castle Hill had 38 hours and we had 21 hours,
11 neither of which is realistic.

12 THE COURT: Yeah. I spent a good time this vacation
13 weekend trying to digest some of the objections. And, frankly,
14 this is the first time I've ever had to try to rule on a
15 14-page swath of a deposition and try to pick out the
16 objectionable portions of those 14 pages from multiple
17 objections listed only by a letter. I mean, it's virtually --
18 well, it's difficult to do.

19 MR. RUBMAN: Yeah.

20 THE COURT: I have to hunt for the question amongst
21 the 14 pages that supposedly contains hearsay. I remember
22 vividly one last night at about midnight after going through
23 about 16 pages of deposition on a hearsay objection, and the
24 last, you know, four lines of those 16 pages had the question
25 that was calling for hearsay. Well, I mean, you know, that's

1 just not good legal work, frankly. And I don't know whether
2 you had a paralegal do that or what. But you shouldn't call
3 upon a federal judge, who's trying to deal with criminal
4 matters and other matters, to try to hunt for some
5 objectionable testimony in a broad swath of pages in a
6 deposition.

7 MR. RUBMAN: Your Honor, we certainly understand
8 that. It was a challenging exercise in part because -- I think
9 you're referring now to Castle Hill's designations and our
10 objections to them?

11 THE COURT: Yes.

12 MR. RUBMAN: And there were lots of them that were
13 10 to 12 pages and we certainly understand the challenge there.

14 What I'm expecting will happen is all of those
15 designations were done prior to your rulings. They also were
16 done prior to the parties doing objections on exhibits and all
17 that. What we are doing, in light of those rulings, is cutting
18 down ours in light of the rulings which I think will eliminate
19 some. Also, in light of hopeful some issues about documents
20 where there's no dispute over authentication, for example. You
21 probably saw lots of that stuff in there, much more so in ours.
22 I think ours were quite a bit more fine-tuned or narrow. So
23 that process is underway.

24 We certainly respect your time and we're not planning
25 to overburden you with unnecessary designations. They're as

1 painful for us as they are for you. Maybe they're more painful
2 for you than for us. But we certainly expect to be very narrow
3 on that.

4 There was one --

5 THE COURT: I'm sure you can appreciate there lots
6 of duplication in these depositions.

7 MR. RUBMAN: There is.

8 THE COURT: And you can tell the depositions that
9 were taken early on when you and opposing counsel were trying
10 to understand the facts.

11 MR. RUBMAN: Sure.

12 THE COURT: And then you obviously get better as
13 time goes on. But there's a lot of duplication in these
14 things.

15 MR. RUBMAN: Yeah. Can I raise one specific issue
16 relating to the depositions?

17 One thing that we have been struggling with, in terms
18 of preparing for trial and to do it in an efficient way, is how
19 to deal with their counter-designations to ours because they
20 never line them up. And one specific example that we think is
21 particularly acute, because we want to play Mr. Yarborough's
22 testimony in our case in chief, we designated -- this is one
23 where both sides designated in the first instance and then both
24 sides did counters to the other side's designations. We
25 designated 37 minutes. They responded by counter-designating

1 two hours.

2 Now, in our case in chief, we want to play his
3 testimony. But to play it with their two hours of
4 designations, which don't match up, we don't quite know how to
5 do that and we're seeking guidance. Our preference would be
6 just to play ours because they want to play theirs separately
7 and they can just play theirs in their case as long as it
8 doesn't overlap. Given it's a witness that's been designated
9 by both sides, that seems fair.

10 THE COURT: Yeah.

11 MR. RUBMAN: There's no lack of completeness because
12 they can play in theirs their two hours, if they ultimately
13 decide that that's how they want to spend their time. But if
14 we can get a little assistance and guidance on that, that would
15 be helpful to us.

16 THE COURT: Well, that's a fair way to do it.
17 Because obviously if a party overdesignates, then they have to
18 suffer the eye rolls from the finder of fact.

19 Yarborough is an interesting guy; right?

20 MR. RUBMAN: He's an -- sorry.

21 THE COURT: He's interesting.

22 MR. RUBMAN: Interesting, yes.

23 THE COURT: Yeah. Or I could employ the old Thomas
24 R. Brett method, you get equal time, you know. If you take 37
25 minutes, you get 37 minutes which, I think, has been upheld by

1 the Tenth Circuit.

2 So let me hear from the other side here.

3 MR. PLATT: Thank you, Your Honor. Henry Platt.

4 Just as a preliminary point on Mr. Yarborough, both
5 sides have designated him. We've designated him on the theory
6 that Mr. Yarborough, who lives in Memphis, or somewhere in
7 Tennessee, near Nashville will be unavailable. Covington &
8 Burling represents Mr. Yarborough. They represented him at the
9 -- at the deposition. If he's not available, it's because
10 they're not making him available, okay? Maybe he doesn't want
11 to come. Maybe -- they have an obligation to make a reasonable
12 effort to bring their witness here.

13 We have asked them. They have not responded to our six
14 e-mails on this issue, okay? So they have the burden of
15 establishing that he's unavailable. If he's not unavailable to
16 them and he's unavailable to us, we should be able to play
17 our -- or have Your Honor read -- and we don't want to waste
18 everybody's time showing a video -- his deposition.

19 THE COURT: Well, what I'm telling you is, you need
20 to whittle it down --

21 MR. PLATT: I understand that.

22 THE COURT: -- and not waste my time either way.

23 MR. PLATT: I agree with that 100 percent, Your
24 Honor. But the idea that, you know, ours is just a
25 counter-designation to their designation is a little

1 frustrating to us. Because, as I said, they haven't responded
2 to our request of whether or not they're actually going to make
3 him available.

4 I am sure that when he sold his company --

5 THE COURT: Well, he wants to utilize the
6 taxpayer-funded services of the federal courts but doesn't want
7 to show up to testify.

8 MR. PLATT: Yes, Your Honor. He was paid one and a
9 half billion dollars for his company. I was told that many
10 times by him.

11 THE COURT: It's Australian money.

12 MR. PLATT: I can assure Your Honor that there's an
13 agreement with VGT that he will make himself available for
14 reasonable litigation issues, okay? We've asked them if that's
15 the fact; we haven't gotten a response. That's all I'd like to
16 say on that.

17 And yes, we also will be whittling down our deposition
18 designations now that we have an agreement on which, as we
19 understand, they are definitely calling as witnesses. Certain
20 people obviously we don't have to waste the court's time with
21 since they've now finally agreed that they're going to bring
22 them in, like Mr. Sevigny, for example.

23 Thank you, Your Honor.

24 MR. RUBMAN: Your Honor, I know you want to get this
25 resolved. A few points.

1 We've told them several times that Mr. Yarborough is
2 unavailable. We tried. We would desperately like
3 Mr. Yarborough here. We've tried. We've had others reach out
4 to him. We've reached out to him directly, to his assistant.
5 He's not at the company anymore; we can't force him to be here.
6 If we could, we would because we want him here. And we've told
7 them already -- I don't understand how he could say that we
8 haven't told them because we have. So I'll just -- I don't
9 know that we need to debate that, but we certainly made our
10 effort because we would love for him to be sitting in that
11 stand.

12 **THE COURT:** My understanding he's essentially just a
13 stockholder now; right?

14 **MR. RUBMAN:** I think he testified that he does own
15 some stock, if I remember. I believe that's right. Or at
16 least he did back then. I don't know. I haven't spoken to him
17 since the deposition other than trying to reach out to contact
18 him to agree to be here. So we are as frustrated as they are
19 on that one, I can assure you.

20 **THE COURT:** Franklin, Tennessee, is that where he is
21 or --

22 **MR. RUBMAN:** I know that he at least had a home
23 there. I think he also spends a lot of time, he told me, in
24 Florida. But I don't know where he is.

25 **THE COURT:** Well, of course. There's no personal

1 income tax in Florida.

2 MR. RUBMAN: I don't know what motivates him. But
3 this is something that we certainly wanted him to be here.

4 THE COURT: All right. Well, let me just probe a
5 little bit of defense counsel.

6 I haven't really looked at your designations in this
7 light. Are you saying that there's so much rich content here
8 that you need to broadcast two hours of Mr. Yarborough's
9 testimony to me?

10 MR. GILL: Let me address that, Your Honor.

11 I think it's fair to say that, based on the fact that
12 the case has been narrowed somewhat from the summary judgment
13 rulings, that we have already determined internally to make a
14 serious effort at cutting down our deposition designations.
15 Obviously, that's a case-by-case decision. And with
16 Mr. Yarborough, who obviously was an important -- he was the
17 top guy at VGT, he is not available to testify at trial, the
18 ability to narrow his testimony may be more difficult than our
19 ability to narrow some other testimony.

20 What we may find, too, is that -- at least for the
21 defense case -- you may find that once a witness has taken the
22 stand, even if it's a representative of a party as an officer,
23 once we've been able to go through the exercise of direct and
24 cross-examination, some of the prior designations may then be
25 mooted. So it may be that, you know, some of that material may

1 fall away as the trial progresses.

2 And if the court please, I do have a few items of my
3 own relating to the conduct of the trial that I wouldn't mind
4 raising with the court.

5 THE COURT: Okay. Let's deal with this first,
6 though.

7 MR. GILL: Sure.

8 THE COURT: It would seem to me that to the extent
9 that designations from the defense are such as described here
10 with Mr. Yarborough, it would seem to me that I'm going to
11 require the defendants to present that testimony in the defense
12 of the case. I think we can put those two pieces together to
13 -- there won't be so much time between the two that I can't
14 understand the full context there. So, I mean, if it's 37
15 minutes versus two hours, you need to present that during your
16 portion of the case.

17 MR. GILL: I understand, Judge.

18 THE COURT: Right. And if it's equal, we'll just
19 hear it all together. It makes it a little easier.

20 MR. GILL: Okay.

21 THE COURT: Okay. Now, your housekeeping matters?

22 MR. GILL: Well, I have a few, Your Honor, if the
23 court please.

24 THE COURT: Oh, we need to take a break.

25 MR. GILL: Sure.

1 THE COURT: All right. We'll be in recess.

2 (Short break)

3 THE COURT: Just one topic I'll bring back up.

4 Although I've watched a good deal of gaming now on the
5 Internet, you know, most of this is videotaped by people who
6 are hooked on it and they're more interested in seeing the
7 reels spinning than they are on the actual bingo table.
8 Frankly, the thing that intrigues me is the fact that this is
9 really bingo and I'd be interested in looking at the bingo
10 card. You know, as you've told me over and over, this is a
11 facade.

12 I did happen to look at the gaming compact over the
13 weekend to see the 4, 5, and 6 percent versus the 10 percent.
14 I know now why we're here, by the way.

15 MR. GILL: That's right.

16 THE COURT: As Mr. Luthey smiles.

17 So one of the other things I get to read about -- and
18 it probably is no surprise that I'm not a denizen of casinos --
19 that I read about how you can feel these mechanical bells even
20 across the casino floor, but you all haven't believed it
21 important enough that I actually experience that. I don't even
22 know how these strobes actually light up because, as I say,
23 most of the videos are these guys who love to focus on the
24 facade, you know, the reels spinning, you know, talking about
25 how, oh, I'm going to try my left hand now instead of my right

1 hand because that will give me a whole lot more luck. My gosh,
2 what are we doing to our people here?

3 But in any event, it fills everyone's pockets. So go
4 ahead.

5 MR. GILL: Right. Well, actually responding to some
6 of Your Honor's remarks, when we were here for a status
7 conference before you back in November, it was certainly my
8 understanding at that conference that you had expressed some
9 reluctance about personally visiting a casino.

10 THE COURT: That I had?

11 MR. GILL: That you had. And you had inquired of
12 the parties to try to think about a way to try to bring the
13 casino experience in your courtroom, which I think was the
14 genesis for both parties to get --

15 THE COURT: Oh, I was told the casinos didn't want
16 me.

17 MR. GILL: Okay.

18 THE COURT: No. That was communicated to me, that
19 they didn't want to have anything to do with this.

20 MR. GILL: Got it.

21 THE COURT: They wanted me to stay a mile away.

22 MR. GILL: All right.

23 THE COURT: And did not -- because they don't want
24 to throw themselves in the middle here.

25 MR. GILL: Right.

1 THE COURT: They like competition.

2 MR. GILL: I'm sure they do.

3 THE COURT: So --

4 MR. GILL: But I think Your Honor had said to us,
5 for whatever reason, that you were reluctant to go experience
6 this yourself in a casino and could we figure out a way to try
7 to bring that experience to you in the courtroom. And one
8 thing that both sides have done is we have taken photographs of
9 not only the plaintiff's machines and the defendants' machines,
10 but other competitor machines and we've also done videos.
11 That's why those are, you know, on the parties' exhibit lists,
12 to be able to try to show you, to the extent we can --

13 THE COURT: Okay.

14 MR. GILL: -- what this looks like. We can't make
15 it 100 percent like, you know, could you hear the deafening
16 bell in here like you could if you were standing next to one in
17 a casino? No, we can't do that for you. But we have made an
18 effort to try to bring the, you know, visual imagery to you and
19 to do it in a way that we hope would be useful for you.

20 THE COURT: Well, maybe that's what the record
21 reflects. I don't recall it that way.

22 But in any event, I did have -- I sat next to a guy who
23 is head of security at one of these big casinos here in town on
24 an airplane and he's invited me out to see the security. Now,
25 I've been out there once before but he claims it's been greatly

1 upgraded since then and had invited me to come out.

2 If there's no objection -- and I won't even say which
3 casino it is -- if there is objection, I won't do it.

4 MR. GILL: Let me caucus with my team and perhaps we
5 should -- the parties should caucus together. I think
6 certainly for -- it's less of a concern for the
7 trademark-related claims. For the trade dress claims, I think
8 the law is pretty clear that Your Honor needs to consider the
9 plaintiff's product, obviously as well as the defendants'
10 products, but also other relevant competitors so you understand
11 what the marketplace is like. The different marketplaces are
12 different so you find different compositions or different
13 machines in different casinos.

14 So for us that may be fine for you as long as we're
15 sure that you're going to be able to see not only the
16 plaintiff's machines and our machines --

17 THE COURT: Right.

18 MR. GILL: -- because the case law makes it very
19 plain it would be error to decide the case just based on that.
20 You've got to also look at the full panoply of the marketplace.
21 As long as we know that you have the ability to go to the right
22 destination and see that and experience that, that may be fine,
23 okay?

24 MR. RUBMAN: Your Honor, we have no objection. It
25 would be great, if you could do that.

1 THE COURT: All right. Well, I do think it's
2 something that you need to talk to your clients about, because
3 I would share the same concerns that Mr. Gill does, and not as
4 a lawyer to personally give my go-ahead. Because as he states,
5 this is multi-faceted and you need to make sure that I decide
6 this on all of the factors rather than just a few. It's
7 difficult to control when a federal judge is just wandering
8 about.

9 I did happen years ago to go through the Cherokee
10 Casino long ago. I wasn't focused on the games. I was mainly
11 focused on all the elderly people pulling their oxygen behind
12 them as they're going from game to game plugging the machines
13 which I found to be very depressing. But --

14 MR. GILL: And probably smoking cigarettes at the
15 same time.

16 THE COURT: Yes.

17 MR. GILL: Right. Well, we appreciate Your Honor
18 giving us that thought and we will caucus as a group and give
19 you a response.

20 There are some additional issues. To the extent Your
21 Honor doesn't have anything else you want to raise with us, I
22 have some issues I wouldn't mind raising with Your Honor, if
23 now is a good time.

24 THE COURT: Please.

25 MR. GILL: All right. First of all, one of those

1 is, do you want or will you accept opening statements from the
2 parties? Without being presumptive and speaking for the
3 plaintiff, it is our view for the defendants that you are as
4 prepared and knowledgeable at this point in the case, having
5 ruled on a lot of motions and reviewed a lot, that we really
6 don't feel like an opening statement is necessary in this case
7 and we begin trial and we're ready to start with the
8 presentation of evidence. That being said, obviously we're
9 mindful of the fact this is your courtroom and we'll give you
10 whatever you want and you feel like is helpful.

11 THE COURT: I do think here, given the many
12 claims -- relatively many claims here, that if you can distill
13 -- it's possible for the plaintiffs, for instance, to distill
14 their claims and say, this is what we're asking for and this is
15 our focus, and the defense to respond, you know, these are our
16 defenses, I do think it would be helpful.

17 MR. GILL: Okay. Do you -- I'm guessing you're
18 going to want to impose some sort of limit on that as well?
19 Have you thought about what limit you would like the parties to
20 use in terms of an opening?

21 THE COURT: Well, my suitemate in state court used
22 to say, "The United States Supreme Court allots 30 minutes per
23 side on the most important cases in the country and this ain't
24 one of them." So I would say 30 minutes per side would be
25 fine.

1 MR. GILL: Very good. And on the flip side of that,
2 when this trial is over, I understand you're going to be
3 wanting proposed findings of fact and conclusions of law from
4 the parties --

5 THE COURT: Yes, sir.

6 MR. GILL: -- and there may be legal briefing in
7 support of that as well?

8 THE COURT: Correct.

9 MR. GILL: I'm guessing at that point you don't need
10 a closing argument because we'll be submitting extensive
11 written materials; is that correct?

12 THE COURT: Correct. Now, obviously I would expect
13 Rule 50 motions.

14 MR. GILL: Yes, sir.

15 THE COURT: Yes, sir.

16 MR. GILL: Yes, sir. We'll be prepared to do that,
17 no question.

18 THE COURT: Right. Because there very well may be
19 opportunities to reduce certain of the claims. You know, we've
20 discussed them today --

21 MR. GILL: Right.

22 THE COURT: -- you know, some of these know-how
23 claims.

24 MR. GILL: Yes, sir. Yes, sir. And we're mindful
25 of the fact that we're not trying to try the case -- pretry the

1 case today necessarily. We just want to know what's -- you
2 know, what the rules are --

3 THE COURT: Right.

4 MR. GILL: -- when we show up here on the 16th.

5 With regard to the rule on witnesses, what's the rule
6 with respect to experts? Our view is that it's helpful in some
7 circumstances for experts to be able to see the testimony
8 that's coming in from the fact witnesses; or if not that, to
9 have the ability to review a transcript. Those are things that
10 are verboten for fact witnesses when the rule is invoked so we
11 want to raise that with you as well.

12 THE COURT: That's always been my approach.

13 MR. GILL: All right.

14 THE COURT: Now, how does that interact with the
15 confidentiality?

16 MR. GILL: Well, the experts are covered under the
17 protective order and have the ability to receive and review
18 information on the protective order so I don't think the
19 protective order is implicated by that at all.

20 THE COURT: All right. I just wanted to make sure
21 all of the experts were covered here, all right?

22 MR. GILL: Right. With respect to the order of
23 proof, I've seen this obviously done a couple of different
24 ways. It depends sometimes if it's a jury trial or a bench
25 trial. It does affect the Rule 50 analysis; that is, does the

1 scope of cross-examination, is it limited to the scope of
2 direct; or do you want us to rather put on a witness and have
3 that witness testify one time and be done?

4 That affects, for example, my planning a little bit
5 logistically. I have been asked by the plaintiff to produce a
6 couple of witnesses for them to be able to examine those
7 witnesses in their case in chief. To be candid, I feel like
8 it's my obligation to produce for them witnesses that I plan on
9 calling in my case so they can call them in their case, if they
10 wish.

11 If I have to -- and none of my witnesses are local. So
12 if I have to fly those witnesses here twice, that presents an
13 extra challenge for me; or if I have to have the witness fly
14 here and remain here for an extended period, that's an issue
15 for me as well.

16 THE COURT: Right. Well, typically lawyers in this
17 community permit more expansive examination of witnesses who
18 are outside -- from outside the jurisdiction --

19 MR. GILL: Right.

20 THE COURT: -- to accommodate them, their schedule,
21 and the cost to the parties.

22 Now, that may affect Mr. Rubman's estimate of five
23 days. And, you know, I've had judges -- I've never had to do
24 this -- have a stopwatch on an attorney. But that would be my
25 general approach. I think it's more reasonable to accommodate

1 those witnesses to allow you to go beyond the scope of direct.

2 MR. GILL: Right. I think it is too. And let me
3 volunteer that where I have had that experience, to be able to
4 cross-examine a witnesses in a more fulsome matter and not be
5 limited to scope of direct, sometimes that eliminates the need
6 for me to call that witness in my case at all.

7 THE COURT: Right.

8 MR. GILL: And so that shortens my case. So it may
9 lengthen the plaintiff's case on the front end and it lengthens
10 the defense case on the back end but I think it's a zero-sum
11 game. I don't think doing it that way adds any time to the
12 trial at all. I think as a practical matter it probably
13 shortens it.

14 THE COURT: I think it could lengthen it. It's not
15 been my experience that that occurs.

16 MR. GILL: Right. So --

17 THE COURT: Any view from plaintiff?

18 MR. SWANSON: We're fine with that, Your Honor.

19 THE COURT: All right.

20 MR. GILL: All right. Thank you, Judge.

21 The parties received an e-mail from your clerk,
22 Ms. Perkins, who obviously is in charge of keeping the trains
23 running on time here, and asked the parties to submit three
24 copies of all the exhibits in this case. That's something I
25 wanted to raise with you, too, because we have so many and some

1 of them -- some individual exhibits are extremely lengthy. So
2 there's some here that are more than a thousand pages for just
3 one exhibit.

4 I was wondering if we could perhaps relax the rule a
5 bit here. I believe counsel is in agreement with that. That
6 each side would produce obviously one hard copy of everything
7 for you, you've got that for your record. But if we're going
8 to have multiple copies of this record, it is going to be
9 extremely voluminous and bulky and take up more of your real
10 estate.

11 THE COURT: The first problem that jumps to mind is
12 that if there's only the original, which we normally allow you
13 then to -- we turn back to you, then we have nothing to refer
14 to.

15 So you're suggesting one original that the witness
16 would see, but then do I have an opportunity to make notes? I
17 mean, that would make it very difficult for me to --

18 MR. GILL: I understand.

19 THE COURT: -- say, give me that, reach over to the
20 witness stand and take it and make notes on it, highlight it,
21 that sort of thing.

22 MR. GILL: Sure, sure.

23 THE COURT: Well, unless you can provide it to the
24 witness electronically.

25 MR. GILL: Well, that's actually exactly where I was

1 goi ng.

2 THE COURT: All right.

3 MR. GILL: It is our intention to present most, if
4 not all, of our evidence in an electronic form. I understand
5 you need at least one hard copy for purposes of your record and
6 purposes of maintaining a record for purposes of any appeal but
7 I prefer the electronic presentation. I think it's easier, I
8 think it takes less time, I think it's more impactful than just
9 a regular paper presentation, and that may reduce the need to
10 have multiple paper copies of what is a voluminous record.

11 THE COURT: Well, that would at least reduce one
12 copy.

13 MR. GILL: Sure.

14 THE COURT: The other problem, though, is if we need
15 to have one copy for purposes of appeal --

16 MR. GILL: Sure.

17 THE COURT: -- then I can't mark on that copy.

18 MR. GILL: Sure so you want a working copy you can
19 markup, et cetera?

20 THE COURT: Yes, si r.

21 MR. GILL: Okay. Well, we're happy to do that.

22 *(Discussion held off the record)*

23 THE COURT: Yes, si r.

24 MR. RUBMAN: I'm glad we're trying to work through
25 this issue. One idea that we wanted to suggest is we will give

1 you a full set of paper so you have one full set of everything,
2 if you want it. For each witness that we are going to call,
3 whether on direct or doing our cross, we will bring a witness
4 binder that has the exhibits most likely to be used. We will
5 give you a copy, we'll give the witness a copy, and we can give
6 the clerk a copy so you can take your notes in that binder. It
7 will be called the Sevigny direct binder, presumably they would
8 bring a Sevigny cross binder, and that's something you could
9 keep and take whatever notes you want. The witness would have
10 it. The witness would also see the exhibits show up on the
11 monitor that we'll have a tech person here.

12 And then at the end of the trial, or whenever you want,
13 we would also suggest that we give to the court an electronic
14 copy of everything that was admitted. So we'll give you a
15 CD-ROM or a drive that has every exhibit that's been admitted
16 so you --

17 THE COURT: Searchable?

18 MR. RUBMAN: I'm sorry?

19 THE COURT: Searchable?

20 MR. RUBMAN: Searchable. It would be on there by
21 exhibit number. But that would mean you would have one full
22 hard copy, if you still want it. You would get the binders
23 from -- a copy of the binder that's given to the witness that
24 should have most, if not all, of the exhibits they're using.
25 Then you would also get an electronic set of the exhibits that

1 are admitted.

2 THE COURT: So you're proposing having hard copies
3 in notebooks for the witness and the court and the record? So
4 you're proposing having three actual hard copies, plus an
5 electronic copy after trial?

6 MR. RUBMAN: Yes. And if you wanted a full
7 hard-copy set, we could do that. I would recommend for any
8 extra-long documents, maybe things above 25 pages or whatever,
9 we just put in the first 25 pages and then supplement it, if we
10 actually use that exhibit later, just to save a few trees here
11 and some space. But that's up to you. There are some long
12 exhibits, some of which won't get used. I know the parties, as
13 often happens, tend to put more on the exhibit list than
14 they'll ultimately use.

15 THE COURT: Correct. Let me counsel here.

16 *(Discussion held off the record)*

17 THE COURT: Don't say this old dog ain't willing to
18 learn new tricks. I'm willing to just go electronic entirely.
19 Can we then instead of having separate notebooks for each
20 witness, just present it to the witnesses electronically? I'll
21 take extensive notes and note the exhibits and we'll just
22 search the electronic database after trial.

23 MR. RUBMAN: We're happy to try that. It does tend
24 to lead to some more leading questions if we have to point --
25 if we have to tell the hot-seat guy what page to show on the

1 screen. But assuming there's -- this is a bench trial. I
2 assume we're going to be a little flexible on our pointing them
3 to the right parts of the document. I mean, in that case the
4 witness doesn't have a physical document to flip through.

5 THE COURT: Right.

6 MR. RUBMAN: So it just -- I mean, would you allow
7 us to give a binder, if we want, if we think that will make it
8 go faster?

9 THE COURT: If you'd like to. I mean, Mr. Gill,
10 your thoughts?

11 MR. GILL: Well, my only concern is that, I mean,
12 the plaintiff had originally listed 1,080 exhibits. So if we
13 don't get a copy of whatever that binder is they're giving the
14 witness, then we're scrambling to get access to whatever
15 documents there are.

16 So in theory, it sounds like a good idea but I don't
17 want to be having to spend time when I should be paying
18 attention to what the witness is testifying to looking for
19 whatever the appropriate document is.

20 THE COURT: All right. So maybe I misunderstood
21 your proposal. Under your proposal, you would not present a
22 copy for the court, but you'd demand one from the plaintiff's
23 attorney?

24 MR. GILL: Well, if we're going electronically and
25 there's no binders, then everybody sees it at the same time,

1 there's no issue, you know. So --

2 THE COURT: Okay. I thought you were professing
3 difficulties with that approach.

4 MR. GILL: So if that's what you're doing, if we're
5 just, you know, displaying the documents electronically to Your
6 Honor and the witness and all counsel at the same time, I think
7 that's fine.

8 *(Discussion held off the record)*

9 THE COURT: Let's try to go all electronic.

10 MR. GILL: Okay. Very good. Then we will do that.
11 With regard to the protective order, I mean, obviously
12 we have a protective order in this case that addresses both
13 confidential and highly confidential information. I don't
14 know -- the order suggests that Your Honor will address issues
15 regarding presentation of evidence that's affected by that
16 order at trial. I don't know how that is or what -- you know,
17 what sort of protocol Your Honor wants to put in place for
18 this. But a related issue is, is the courtroom going to be
19 sealed?

20 THE COURT: Specifically, what are you concerned
21 about with regard to confidential and --

22 MR. GILL: Well, obviously certain discovery
23 material has been designated by the parties under the
24 protective order. And, you know, with regard to presentation
25 of evidence in the courtroom, ordinarily if I'm representing a

1 corporate client, I'm going to have a corporate representative
2 present in the courtroom.

3 THE COURT: Right.

4 MR. GILL: The corporate representative is going to
5 be present in the courtroom when there's testimony of highly
6 confidential and confidential documents being flashed on the
7 screen. Seems to me that's just inherent in the nature of
8 having a trial in a case like this; correct?

9 THE COURT: Sorry. I didn't pick up on that obvious
10 point with your first mention.

11 MR. GILL: Right.

12 THE COURT: Mr. Rubman, your thoughts?

13 MR. RUBMAN: If the question is whether the
14 courtroom should be sealed at times, I think the answer's yes.
15 There are going to be sensitive trade secrets and confidential
16 information on both sides disclosed --

17 THE COURT: But exclusion of corporate
18 representatives?

19 MR. RUBMAN: Yeah, that's what I was going to get
20 to.

21 If that is a separate issue, I think it depends
22 somewhat on who that corporate representative is. I know
23 there's already been issues that you've ruled on with respect
24 to Mr. Watson and, you know, I think the same concerns that we
25 express there would apply. I don't know who the witness would

1 be -- or who the corporate representative would be but we do
2 have concerns.

3 Our corporate representative, the person we would
4 submit to go through it, would be the general counsel so we
5 think there's less of a concern from a business side. We're
6 doing that partly to address this issue to not make it as
7 acute. But I think in that sense, it will depend on who it is.

8 THE COURT: So would your proposal be then that we
9 just go step by step with regard to, say, particular witnesses
10 or particular documents, and then you would approach -- or ask
11 that the courtroom be sealed and certain individuals excluded
12 during that portion of the trial?

13 MR. RUBMAN: I reluctantly say yes. I think that
14 both sides will have to be careful and sensitive to the need
15 for there to be an open courtroom, but there are things where I
16 think we would -- our position should be that it should be
17 sealed. I think there's a lot of internal back and forth and
18 documents and I'm less concerned about some of the e-mails.
19 But when we start getting really about trade secrets and
20 confidential business information, we would request that the
21 courtroom be sealed.

22 We can -- we can try to put all of that together for a
23 certain -- like if a witness is going to testify on -- like
24 Stacy Friedman is going to testify about trade secrets and
25 trade dress issues and trademark issues -- I guess mostly trade

1 dress issues -- we would do our best to keep the trade secrets
2 apart so we can allow the corporate representative to see as
3 much as possible.

4 THE COURT: Yes. Right.

5 MR. RUBMAN: But that would be our view.

6 THE COURT: Mr. Gill, your thought as to that
7 approach?

8 MR. GILL: Well, my thought is that as the defendant
9 in a trade secret action where it has been difficult at times
10 to figure out exactly what the nature is of the claims, I would
11 object to that. I think my client has an absolute right to be
12 present in the courtroom at all times and see the evidence
13 that's being unfolded against them and to be able to advise me
14 how to respond to some of it.

15 I've been in a position where during the duration of
16 this case, I have been prohibited and we have strictly complied
17 with those requirements under the protective order to not share
18 highly confidential information to our client. But when time
19 comes for trial, I need to be able to communicate with my
20 client about the claims and how to refute those claims and I
21 need somebody in the courtroom for the duration of the trial.
22 So I object to that.

23 And I also would note that the Tenth Circuit law on
24 this issue takes a certain position with respect to judicial
25 records, and obviously the record of the conduct of this trial

1 is a judicial record within the meaning of the cases. I had
2 cited this Tenth Circuit case in my motion for relief under the
3 protective order to obtain consent to show certain highly
4 confidential information to limited Castle Hill personnel, and
5 it seems to me that's implicated about this as well.

6 I think it's a thorny issue. I have had a trade
7 secrets trial in the Eastern District of Virginia where the
8 district court just flat refused to seal the courtroom and said
9 that that's one of the risks of a trial in this case. But
10 there's no question my client has an absolute right to be
11 present for that and I strongly object to any suggestion that
12 they don't.

13 THE COURT: You mean there's a constitution?

14 MR. GILL: Yes, there is. And I also want to say --
15 and, again, I think I understand where the plaintiff is going
16 in terms of its selection of its corporate representative. On
17 the one hand, I think the plaintiff has the right to choose who
18 its corporate representative is. Castle Hill also has some
19 sensitive information that we've produced in discovery in this
20 case. It includes, but is not limited to, financial data. And
21 if it includes Mr. Dunn, who is not only general counsel, but
22 also functions in a business role, as I understand it, based on
23 the settlement conversation we had in Oklahoma City, I have
24 concerns about him being able to hear some of that information.
25 But, again, we may not be able to control that when we're here

1 for the trial. But that's something I didn't think we should
2 be addressing for the first time on the 16th.

3 THE COURT: I think you're exactly right. I think
4 these issues are fascinating. I think courts often err in
5 sealing cases, the courtroom. Clearly the pressure, which is
6 right-minded from the Administrative Office of the Courts and
7 the appellate courts, is that matters in cases and documents
8 should be sealed only when necessary.

9 I'm going to have to do a little bit of research as to
10 a corporate representative. I've never been presented with
11 this issue in the 22 years I've been on the bench. So I'm
12 sensitive to your concerns.

13 MR. GILL: I appreciate that, Judge. I have tried a
14 number of trade secrets cases and I've never had a corporate
15 representative excluded from the courtroom at trial.

16 THE COURT: I've also had those sorts of arguments
17 made to me and I have found that the law is to the contrary.
18 So I'm going to -- I'm going to research the law and find out.

19 MR. RUBMAN: And, Your Honor, we're happy to have it
20 go both ways. We didn't mean to suggest that our person would
21 be able to sit through the whole trial. If you're sealing it
22 for some things, we're happy -- we want it to go both ways.
23 We're not suggesting we should allow our corporate
24 representatives to hear everything.

25 THE COURT: Sure, sure. All right. Any other

1 housekeepi ng --

2 MR. GILL: Actually, one additional issue that's
3 exhibit related, Judge. And that is -- and actually this is
4 probably a mooted issue based on your statement that you're
5 willing to go completely electronic. But a number of the
6 documents in this case are Excel spreadsheets and they have
7 been produced in native format. So we can display them on a
8 screen and they look nice on a screen and we can manipulate
9 them on a screen. They're very difficult to print out and make
10 hard copies of. They print out with a large number of pages,
11 you know, chopping up the data on different pages in a way it's
12 very hard to follow.

13 THE COURT: Right.

14 MR. GILL: But based on your ruling, I don't think
15 we're going to have an issue on being able to use those in a
16 good way. The hard copy -- and we can certainly produce
17 electronic copies of everything. If that's sufficient for you,
18 that's great. I know for purposes of transmission of the
19 appellate record, I know that that's traditionally done
20 electronically now. So it may be that we don't need to worry
21 about anything else for purposes of the record.

22 THE COURT: It would seem to moot the problem.

23 MR. GILL: I think that's right.

24 THE COURT: Right. Any housekeeping matters that we
25 have not discussed?

1 MR. RUBMAN: Your Honor, Mr. Gill did a great job
2 going through our list as well so we're all set, except one
3 issue as I stand here.

4 The normal hours that you'd like us here, starting and
5 stopping for lunch, and then how long? These are the important
6 things; we have to figure out where everyone's eating lunch.
7 But what's your preference on that?

8 THE COURT: Well, my preference -- and we can
9 discuss this; I'm not set in stone at all -- but would be 9:00
10 to 5:00 with an hour, wherever the hour most appropriately
11 falls. It doesn't need to be at straight up 12:00. It could
12 be 12:30, it could be at 1:00, depending on whether we're close
13 to the end of a witness who could be put on an airplane and
14 sent off to do productive things.

15 MR. RUBMAN: Sure. Perfect.

16 THE COURT: But that would be my recommendation. So
17 that's -- well, that would only allow for seven hours per day.
18 Any thoughts?

19 MR. RUBMAN: That's fine with us, Your Honor.

20 THE COURT: Mr. Gill?

21 MR. GILL: I think that's fine as well, Your Honor.

22 One related note on witnesses, and that is it may be
23 helpful for the parties to inform the court and opposing
24 counsel who they plan on calling. So, for example, for the
25 plaintiff to tell us who they're going to put on on Monday, it

1 helps us be able to figure out what to do with regard to
2 management of our own evidence, particularly if scope of cross
3 is not limited to direct. And vice versa. We would obviously
4 do the same thing for them when we're in our case in chief,
5 telling them who we're going to put on the stand and what we
6 expect the presentation of evidence to be.

7 THE COURT: Well, that's the normal practice around
8 here. At a minimum, inform counsel the evening before who
9 you're going to produce the next day. Is that what you're
10 suggesting?

11 MR. GILL: We agree with that.

12 MR. RUBMAN: Yeah. I was going to suggest 48 hours
13 but we can -- maybe we can talk about it.

14 MR. GILL: Sure, we can talk. But that's fine.

15 THE COURT: Can you do 48 hours?

16 MR. GILL: I don't see why not.

17 THE COURT: All right.

18 MR. RUBMAN: And then we would -- we would --
19 normally I find that we also tell the court so that we can
20 submit something to the court so you know who's coming, if
21 you'd like.

22 MR. GILL: If you want.

23 THE COURT: It would be sometimes helpful. Most of
24 the time it's more important that you know. But obviously if
25 you can transmit that to opposing counsel, you might as well

1 I let us know as well so I can maybe get ready for a particular
2 witness.

3 MR. RUBMAN: Sure.

4 THE COURT: Now, I don't want to suggest that at
5 straight-up 5:00 we're going to stop. Obviously, again, if
6 there's a witness that we can get on a plane and out of town,
7 if we take an additional, you know, 35 minutes, we're going to
8 do that to accommodate that witness. So --

9 MR. GILL: Thank you, Judge.

10 THE COURT: All right. Anything else?

11 MR. RUBMAN: Nope. Thank you.

12 THE COURT: All right. When can you submit a
13 revised proposed pretrial order?

14 MR. GILL: This is the first suggestion that -- or
15 thought we had on our side that we would need to submit a
16 revised order, Your Honor. Do you mean based on today's
17 rulings?

18 THE COURT: Correct.

19 MR. GILL: Is there any reason -- we've asked your
20 court reporter for a transcript of today. Is there any reason
21 why we couldn't just use that instead of revising the order?

22 THE COURT: I would prefer a revised order.
23 Obviously, the record today will reflect my rulings on these
24 various issues that you've set out. But it's not --

25 MR. GILL: Correct.

1 THE COURT: -- my practice to have a pretrial order
2 where you all argue about what cases -- or what claims are
3 going to be presented at trial. I want a pretrial order
4 setting forth and governing the course of the trial based, at
5 least in part, on these rulings today.

6 MR. GILL: Okay.

7 MR. RUBMAN: Can I suggest -- we have our pretrial
8 briefs due on Monday, I believe. How about a week from -- so
9 next Wednesday?

10 THE COURT: That's fine with me.

11 MR. RUBMAN: If that's okay with you?

12 MR. GILL: We can live with that, Your Honor.

13 THE COURT: All right.

14 MR. GILL: And that actually unfortunately reminds
15 me of a couple other things --

16 THE COURT: That's fine.

17 MR. GILL: -- that we need to discuss.

18 THE COURT: I'd rather address it today.

19 MR. GILL: With respect to briefs, obviously the
20 parties submitted a document to Your Honor asking what Your
21 Honor wanted, and I think Your Honor said to us that this case
22 has been pretty well briefed, but if we felt the need to brief
23 something, we could file a brief of up to twenty pages.

24 With respect to, for example, when we had summary
25 judgment argument, the plaintiff had some significant

1 PowerPoint preparations they presented at the morning of trial.
2 We obviously hadn't seen those before and would not have a
3 chance to respond to something like that.

4 Can we have an understanding that whatever brief is
5 submitted is submitted on the deadline on the 9th and there's
6 not going to be any further submission on the morning of trial
7 that we don't have an opportunity to respond to?

8 THE COURT: Well, if it's submitted on the morning
9 of trial, the court's not going to be -- have the opportunity
10 to read it. So any -- don't we have a deadline for any trial
11 briefs? That's typically in our schedule.

12 MR. GILL: I think it's the 9th. Right. I think
13 it's the 9th, Your Honor.

14 THE COURT: Which is next Monday?

15 MR. GILL: Right.

16 THE COURT: Well, that's the order of the court.

17 MR. GILL: That's the deadline?

18 THE COURT: Right.

19 MR. GILL: All right. And the only remaining is
20 to -- and this relates to the plaintiff's witnesses because the
21 plaintiff had identified, I believe, 20 witnesses on its
22 expect-to-call list and another 18, I believe, on the may call
23 should the need arise. And I don't know if the plaintiff still
24 plans to call the may-call witnesses. It seems to me that some
25 of them may be mooted. I don't recall seeing a statement of

1 what the testimony would be from those witnesses. So if the
2 plaintiff is going to call those witnesses, we would request
3 that as part of the revised pretrial order.

4 THE COURT: I didn't scrutinize the appendices here
5 with regard to witnesses. Was there expected testimony not set
6 forth in the -- well, there, I'm looking at appendix D, VGT
7 witnesses.

8 MR. RUBMAN: Your Honor, I think the issue is is
9 that in your form pretrial order, it refers to identifying and
10 describe the testimony of the witnesses that you will call.

11 THE COURT: Yes.

12 MR. RUBMAN: And so that's what we limited it to.

13 THE COURT: Yes, sir.

14 MR. RUBMAN: And I understand defendants also
15 included descriptions for their may-calls, but we didn't
16 understand that that was required by your pretrial order.
17 That's the difference.

18 THE COURT: Well, it looks to me, as I'm looking at
19 appendix E, you've describe what the witnesses on your may-call
20 list are expected to testify about.

21 MR. RUBMAN: That's what Castle Hill did. Ours is
22 -- ours is --

23 THE COURT: Oh, I'm sorry.

24 MR. RUBMAN: -- appendix D. We included
25 descriptions only for our will-call list which is what we

1 understood the rule to say.

2 THE COURT: Okay. I would ask that you specify what
3 these may-call witnesses --

4 MR. RUBMAN: Okay.

5 THE COURT: -- are expected to testify about as
6 well.

7 MR. RUBMAN: Sure. We can add that.

8 THE COURT: So you didn't even list those may-call
9 witnesses?

10 MR. RUBMAN: The may-call are in the pretrial
11 disclosures --

12 THE COURT: Yes, sir.

13 MR. RUBMAN: -- which were submitted a few days or a
14 week before so they do have that list. But in the pretrial
15 order, we understood that it was just limited it to the
16 will-calls was our reading.

17 THE COURT: All right. We'll take a look at that
18 language. But I'd ask that you include then in your appendix D
19 those that you may call as well as the summary of their
20 expected testimony.

21 MR. RUBMAN: Okay.

22 THE COURT: All right. Anything else?

23 MR. RUBMAN: Thank you.

24 MR. GILL: Nothing else from the defendant, Your
25 Honor.

1 THE COURT: All right. And have you all attempted
2 in any way to resolve this matter?

3 MR. GILL: Yes is the short answer.

4 THE COURT: All right. The magistrate judge said he
5 would stand ready, if necessary.

6 MR. GILL: Right. I think at this point the
7 logistics of involving the magistrate judge might make that
8 difficult given the location of the parties.

9 In the ordinary case, counsel are, you know, integrally
10 involved in the discussions and negotiations. There are --
11 it's my understanding is there are active discussions that are
12 underway between a representative of the plaintiff and the CEO
13 of my client which counsel are not in the middle of. And it's
14 my understanding generally, not having been in the middle of
15 those negotiations, that they've actually made fairly
16 significant progress and that there remains a possibility that
17 this case may resolve.

18 MR. RUBMAN: I just want to make sure the record's
19 not inaccurate. We are involved and we're familiar with what's
20 going on, and I believe Mr. Jacobs is involved as well, who's
21 on the phone, from what we can tell. There are -- there have
22 been drafts that have gone back and forth. Whether we'll get
23 to the finish line or not is anyone's guess.

24 THE COURT: All right. Well, very well. We'll
25 stand ready to try it, if necessary, and let me know if any

1 other issues pop up prior to trial.

2 We, I think, have our decks cleared. No criminal cases
3 set for trial? I guess we had the Tan case, which
4 interestingly is alleged theft of trade secrets from Phillips
5 66 by a Chinese national educated at Caltech. FBI contends
6 that certain trade secrets with regard to the manufacture of
7 high-tech coke used in the production of metals for batteries
8 has been sent to China. So interesting. But I think the
9 attorneys who are trying to set up depositions of Chinese
10 nationals in Hong Kong are having some difficulties, as might
11 be expected right now.

12 Anyway, thank you all very much and we're adjourned.

13 MR. GILL: Thank you, Judge.

14 MR. RUBMAN: Thank you.

15 *(The proceedings were concluded)*
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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 5th day of September 2019.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter